U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
JAN 14 1972
E. ROBERT SEAVER, CLERK

No. 71-921

JOSEPH FISCHETTI and DONALD F. GILLETTE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK RAGANO
RAYMOND E. LAPORTE
RAGANO & LAPORTE
408 Madison Street
Tampa, Florida 33602

THOMAS A. WADDEN, JR.
888 17th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioners

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Questions Presented	3
Statement of the Case	4
Reasons for Granting the Writ	5
Conclusion	12
Appendix A	1a
Appendix B	15a

AUTHORITES CITED

Cases

Bruton v. United States, 391 U.S. 123 (1968)	11
Dutton v. Evans, 400 U.S. 74 (1970)	11
Ex Parte Bain, 121 U.S. 1 (1887)	9
Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963	10
Russell v. United States, 369 U.S. 749 (1962)	8
Stirone v. United States, 361 U.S. 212 (1960)	8
Wong Tai v. United States, 273 U.S. 77 (1927)	8

Statutes

	PAGE
18 U.S.C. §2	4
18 U.S.C. §371	1, 2
28 U.S.C. §1254 (1)	2
29 U.S.C. §186	2, 3, 4, 5, 1a, 8a
29 U.S.C. §186 (a)	2, 1a
29 U.S.C. §186 (b) (1)	2, 4, 1a, 5a, 20a, 21a
29 U.S.C. §186 (d)	3

United States Constitution

Fifth Amendment	9, 10, 11

Miscellaneous

41 Am Jur 2d, Indictments and Informations, §71	7

IN THE

Supreme Court of the United States

October Term, 1971

No.

JOSEPH FISCHETTI and
DONALD F. GILLETTE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Joseph Fischetti and Donald F. Gillette, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming a judgment of the United States District Court for the Southern District of Florida, dated October 27, 1971, convicting them of a violation of 18 U.S.C. §371 (one-count).

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet officially reported, is reprinted herein as Appendix A.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 27, 1971. A timely petition for rehearing was denied on November 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

18 U.S.C. §371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

29 U.S.C. §186(b)(1):

> It shall be unlawful for any person to request, demand, receive, or accept or agree to receive or accept any payment, loan, or delivery of any money or other things of value prohibited by subsection (a) of this section.

29 U.S.C. §186(a):

> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert adviser, or consultant to an employer or who

acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

* * * *

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

29 U.S.C. §186(d):

Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Questions Presented

1. Whether Count I of the indictment, which charges a conspiracy to violate 29 U.S.C. §186, is fatally deficient by reason of its failure to allege that the object of the conspiracy was to commit a knowing, willful and unlawful violation of the substantive offense.

2. Whether the District Court Judge erred in allowing a witness to testify concerning an attempted obstruction of justice which was not charged in the indictment.

Statement of The Case

Petitioners were tried in the United States District Court, for the Southern District of Florida. Count I of the indictment charged that they conspired to violate 29 U.S.C.A. §§ 186. (Appendix B) Counts II, III and IV charged the petitioners with violations of 29 U.S.C.A. §186 (b) (1) and 18 U.S.C.A. §2. On the morning the trial commenced the government moved to dismiss Counts II, III and IV and substitute therefor an information charging the identical offenses, but alleging that they were committed unlawfully, willfully and knowingly. The Court granted the motion and Counsel moved for a continuance to file further motions. The Court then reinstated the original counts and allowed the government to amend each by adding the words unlawfully, willfully and knowingly. Briefly stated, the proof at trial was as follows.

Bellows, an unindicted conspirator, was in the construction business and having labor difficulties. In May, 1968 he entered into an agreement with the Miami Building and Construction Trades Council, which required that he use union labor exclusively after he completed his current project. In January, 1969 he commenced a new project, but failed to hire union labor per the Agreement with the Council.

Bellows contacted Fischetti and requested his assistance in anticipation of labor difficulties with the Council. A few days later Fischetti introduced Bellows to Petitioner Gillette, a business agent of Teamsters Local 769 and a delegate to the Miami Building and Construction Trades Council. After

negotiation, it was agreed that Bellows would pay $12,000 to the Petitioners, who were to obtain the Agreement from the Council's office and return it to Bellows. Also, Fischetti was to be retained by Bellows as a labor consultant at $150 a week. The next day Fischetti delivered the Council's copy of the Agreement to Bellows, and accompanied him to the bank where he was paid $12,000 by Bellows. Fischetti was also paid $150 for 26 weeks.

Gillette testified that at Fischetti's request he had talked to Bellows on two occasions and told Bellows that he could not help him with his labor problems.

Count V of the indictment, which was severed prior to the impaneling of the jury, charged Fischetti with obstruction of justice. At trial Bellows testified that after receiving a Grand Jury subpoena in October, 1969 he was visited by Fischetti. He said Fischetti told him to take the Fifth Amendment if he were called to testify.

Reasons for Granting the Writ

1. The Petitioners were found guilty on Counts 1, 3, and 4, but acquitted on Count 2. The Court of Appeals for the Fifth Circuit sustained the conviction on Count 1, but reversed as to Counts 3 and 4.

In reversing the convictions on Counts 3 and 4 the Court of Appeals held that willfulness is an essential element in prosecutions for violation of Title 29 U.S.C.A. §186, and as such, must be alleged as well as proven in order to obtain

a conviction (Slip opinion p. 7). The Court held that the trial judge was without authority to amend Counts 3 and 4 to include that element. It follows as a necessary corollary that an indictment which omits this essential element alleges no crime. In its application of these principles to the count charging conspiracy to violate that same statute, however, the Court accorded a different treatment. Thus the opinion read:

> The essential elements of a conspiracy are an agreement by two or more persons to combine efforts for an illegal purpose and an overt act by one of the members in furtherance of the agreement. *Roberts v. United States*, 5 Cir. 1969, 416 F.2d 1216, 1220. In a conspiracy count the conspiracy is the gist of the offense and it is not necessary that the object of the conspiracy be described in the detail necessary in an indictment for the substantive offense itself. See *Wong Tai v. United States*, 1927, 273 U.S. 77, 47 S.Ct. 300, 71 L.Ed. 545; *Walker v. United States*, *supra* at 25; *Lott v. United States*, 5 Cir. 1962, 309 F.2d 115, 120, *cert. denied*, 1963, 371 U.S. 950, 83 S.Ct. 504, 9 L.Ed.2d 498; *Beitel v. United States*, 5 Cir. 1962, 306 F.2d 665, 670; *Schnautz v. United States*, 5 Cir. 1959, 263 F.2d 525, 530, *cert. denied*, 1959, 360 U.S. 910, 79 S.Ct. 1294, 3 L.Ed.2d 1260. Every element of the substantive offense need not be alleged within the conspiracy count. *United States v. Knox Coal Co.*, 3 Cir. 1965, 347 F.2d 33, 38, *cert. denied*, 1965, 382 U.S. 904. The conspiracy count here sufficiently alleges the essential elements and is, therefore, not infirm. (Slip opinion pp. 9-10).

It should be made clear at this point that no issue is taken with the statements of law enunciated above. Rather, Petitioners believe that under the particular facts of this case those abstract principles must yield to more fundamental considerations.

Clearly, the conspiracy count at issue was not uttered by the grand jury in a vacuum. A comparison of the charged objects of the conspiracy (paragraphs 4, 5 and 6) with substantive Counts III and IV[1] reveals that they describe identical non-willful conduct in virtually identical language. Thus, whatever agreement between the defendants which the grand jury may have found was one which was coextensive with and inextricably bound to the conduct alleged in the substantive counts. Both common sense and legal dictum require that what is written in an indictment must be read in the light of the circumstances under which it was found. 41 Am Jur 2d., Indictments and Informations, §71. Viewing the conspiracy count in context, it appears that it represents a finding by the grand jury that there existed an agreement between defendants that certain money would be given and received. Nowhere in the substantive counts does there appear that finding which would impart criminality to the conduct recounted. That this fact represents an admission of record by the United States which can be neither refuted nor ignored is implicit in the Court of Appeals' opinion. Stated more concisely, the fatal defect inhering in the indictment is that it charges a conspiracy to commit no crime

[1] As they existed prior to the improper amendment.

against the laws of the United States. This being so, the count itself fails to allege an offense.[2]

As noted above, Petitioners do not contend that a conspiracy count must describe the object of the conspiracy in the detail required in an indictment for the substantive offense itself. See *Wong Tai v. United States*, 273 U.S. 77, (1927) 47 S.Ct. 300, 71 L.Ed. 545. The essential difficulty presented by this conspiracy count, however, is that the grand jury undertook to go beyond what was minimally required and described in the charging paragraphs particulars of the offense which it attempted to allege. The description in question, then, is significant not for what it includes, but for what it omits. While the basic function of an indictment is to convey the extension of alleged criminal conduct, its complementary function of firmly fixing the limits of the offense has also been emphasized by the federal courts and cannot be overlooked here. As was said in *Stirone v. United States*,[3] "the very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." 361 U.S. at 218; see also *Russell v. United States*, 369 U.S. 749, 771 (1962).

Just as the Court of Appeals has ruled with respect to the substantive counts that no court may presume that the grand jury would have been willing to find that the defendants'

---

[2] It is recognized that a conspiracy may also be criminal if its purpose is to effect a lawful act by unlawful means. However, no facts comporting with that theory were charged, proven, or found.

[3] 361 U.S. 212 (1960).

acts were committed willfully, it could not, by affirming this conviction, i.e. the conspiracy count, add to the grand jury's findings the essential measure of criminality which their indictment omitted. The failure to find and charge a willful and knowing receipt of money here is "neither trivial, useless, nor innocuous". *Stirone, supra* at 217. What was said by the late Mr. Justice Black in *Stirone* is pertinent here:

> "It follows that when only one particular kind of commerce is charged to have been burdened, a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened". *Stirone, supra* at 218. (Emphasis Added)

Affirmance of the conspiracy conviction here would involve the same error condemned long ago in *Ex Parte Bain*, 121 U.S. 1 (1887), speculating as to what the grand jury would or should have found. Indeed, here the speculation would fly in the face of the only evidence which exists of what the object of the conspiracy was, namely the substantive counts already condemned by the Court of Appeals.

2. The trial court severed Count V on the grounds that the evidence of Fischetti's alleged instruction to Bellows to invoke the Fifth Amendment if called before a Grand Jury might prejudice the petit jury in its consideration of Counts I through IV[4]. However, at trial, despite the objections of

---

[4]See Count V Appendix B

both defendants, Bellows was allowed to testify as to that conversation.

The government introduced this line of testimony on the theory that it was part and parcel of the conspiracy tending to establish concealment. Fischetti objected to its introduction for the reason that it was prejudicial to him, and the Court of Appeals agreed. Nevertheless, the Court justified the admissibility of this testimony on the basis that such conduct was criminal and "the acts were committed with the intent of avoiding punishment for the present crime." (Slip opinion, p. 10).

In offering this evidence, Petitioner Fischetti contends that the government set upon a course to deliberately influence the jury against him, particularly so since the prosecutor knew that he would not take the stand. If Bellows testified truthfully at trial, there was every reason for him to exercise his Fifth Amendment privilege before the Grand Jury,[5] and it is significant that he testified only after a grant of immunity. Moreover, the Grand Jury found that Bellows' conduct was criminal, and the testimony at trial established that he was the instigator of the alleged criminal partnership.

The Court's ruling, if not reversed, will give the government yet another toy for the prosecutor's nursery. By a mere allegation of conspiracy he would make it a crime before any determination of guilt for two alleged co-conspirators to dis-

---

[5] *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963.

cuss those rights guaranteed them by the Constitution. Such a result would do damage to both the purpose and spirit of the Fifth Amendment.

Since the conversation between Bellows and Fischetti was not in furtherance of the conspiracy the Court held it was error to admit it against Gillette, and that the trial court's instruction to the jury was insufficient to cure this error. (Slip opinion, p. 12) Applying the standard set forth in *Dutton v. Evans*, 400 U.S. 74 (1970), the Court concluded that the error was not of such "constitutional dimensions" as to warrant reversal. Petitioner Gillette contends that the severance of Count V was proper and that the admission of this evidence was so prejudicial as to deny him a fair and impartial trial.[6] Fischetti determined not to take the stand and the only evidence before the jury suggested that Fischetti had attempted to cover his alleged misconduct by advising Bellows not to testify. The jury could only consider this as a confession of guilt which necessarily would infect it consideration of Gillette's guilt or innocence. The prejudice was compounded due to Gillette's inability to call Fischetti as a witness.

To find "that the judgment of the jury was not swayed or influenced by the admission of this testimony." (Slip opinion, p. 12) is to disregard those factors which normally determine a jury's verdict. The government contended and the Judge so instructed that the acts of one co-conspirator were the acts of the other. Therefore, the jury must have believed

---

[6] *Bruton v. United States*, 391 U.S. 123 (1968).

that Gillette bore joint responsibility with Fischetti in connection with his Fifth Amendment advice to Bellows.

Both petitioners contend that the introduction of this evidence was so prejudicial as to require a reversal of their convictions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK RAGANO
RAYMOND E. LAPORTE
RAGANO & LAPORTE
408 Madison Street
Tampa, Florida 33602

THOMAS A. WADDEN, JR.
888 17th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioners

APPENDIX A

APPENDIX A

Opinion

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1175

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH JOHN FISCHETTI, and
DONALD F. GILLETTE,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

(October 27, 1971)

Before: GEWIN, GOLDBERG and DYER,
Circuit Judges.

DYER, Circuit Judge: A jury convicted the appellants on a two count violation of 29 U.S.C.A. § 186 (b) (1) and one count of conspiracy to violate § 186.[1] Appellants urge on appeal that the trial court errored in permitting the indictment to be substantially amended, in admitting pre-

[1] § 186 states in part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, deliver, or agree to pay, lend, or deliver any money or other thing of value

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

18 USCA

§ 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

judicial and hearsay evidence, and in its instructions to the jury on conspiracy. We affirm the conspiracy conviction and reverse the conviction on the two substantive counts.

The convictions rested largely upon the testimony of the witness Bellows. He was in the construction business, and, apparently experiencing some labor problems in May, 1968, entered into an agreement with the Miami Building and Trades Council obligating himself to use union labor after he completed his current building project. In January, 1969, he began to seek union bids for his next job, and finding them exorbitant, he hired non-union trades in violation of his agreement with the Council. In anticipation of a dispute with the Council he contacted appellant Fischetti and requested his assistance.

Several days later, at Fischetti's request, Bellows came to Fischetti's home and met with him and appellant Gillette, a business agent of Teamsters Local 769 and a delegate from that local to the Miami Building and Trades Council. Gillette offered to obtain the Council's copy of the Bellows agreement and return it to Bellows for $13,000. Bellows left saying he would think it over. A few days later Fischetti called Bellows and asked him to come to his home. Bellows there met Fischetti and Gillette again and accepted their offer to obtain the agreement in exchange for $12,000 and to retain Fischetti at $150 per week as a labor consultant for the duration of the construction project.

The next day, February 14, 1969, Fischetti came to Bellows' office and gave him the Council's copy of the agree-

ment. They drove to a bank together where Bellows cashed a check and gave Fischetti $12,000. Fischetti also received twenty-six weekly $150 payments terminating on August 21, 1969.

In October, 1969, Bellows was served with a subpoena to testify before the grand jury. He was then visited by Fischetti who told him to take the Fifth Amendment if called upon to testify. Bellows testified after a grant of immunity.

At trial Bellows' copy of the agreement was introduced in evidence, but the Council's copy could not be located in its files. Evidence was also introduced to the effect that delegates to the Council had access to the file which contained such agreements.

Gillette testified that while he did meet with Bellows and Fischetti, when Bellows explained his problems concerning the agreement he refused to help. He testified further that he met again with Bellows at Fischetti's home and reiterated to Bellows that he could not be of any assistance. Fischetti did not testify.

Gillette also introduced evidence through other witnesses to the effect that he had no real authority or duties within the Council. Other union and council officials testified that they had never seen the completed Bellows agreement although a blank copy had been left with Bellows for him to sign pending some advice from his lawyer.

The appellants were indicted on May 13, 1970. Count 1 of the indictment charged that Fischetti and Gillette con-

spired together and with Bellows to violate 29 U.S.C.A. §186. Counts 2, 3 and 4 charged the appellants with violations of 29 U.S.C.A. §186(b)(1) and 18 U.S.C.A. §2.[2] Count 5 charged Fischetti with obstructing justice.

Prior to trial Count 5 was severed from the indictment. On the day before trial the Government filed an information superseding substantive counts 2, 3 and 4 of the indictment. The offenses charged in the information were essentially the same as those charged in the indictment, except that the words "unlawfully, willfully and knowingly", omitted in the indictment, were added to each count in the information. Counts 2, 3 and 4 of the indictment were dismissed and the Government's motion to consolidate count 1 of the indictment with the information was granted. The appellants were then arraigned and pled to the consolidated indictment-information but objected to the addition of the words "unlawfully, willfully and knowingly" insisting that the amendment constituted a substantial change and that they were not prepared to defend against it. The trial court refused a continuance, vacated the order granting leave to file the information, and instead permitted the original indictment to be amended to include the words "unlawfully, willfully and knowingly" in each substantive count.

---

[2] §2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Appendix A—Opinion

The appellants were found guilty of counts 1, 3 and 4 but not guilt of count 2 of the amended original indictment.

Because we find merit in the assertion of error with respect to the amendment of the indictment we will discuss it first and then proceed with the complaint of prejudice to the appellants because of Bellows' testimony concerning the Fifth Amendment incident and finally appellants' attack on the conspiracy instruction.

The Amendment of the Indictment

Appellants contend that the amendment to the indictment effected a substantial change in the nature of the offenses charged, the authorization of which exceeds the trial court's power to allow an amendment to an indictment except in matters of form. We agree.

An indictment is required to set forth the elements of the offense sought to be charged, *United States v. Debrow*, 1953, 346 U.S. 374, 376, 74 S.Ct. 113, 98 L.Ed. 92; *United States v. Auerbach*, 5 Cir. 1969, 420 F.2d 921, 923, *cert. denied*, 1970, 399 U.S. 905, 90 S.Ct. 2195, 26 LEd.2d 560; Fed. R. Crim. P. 7(c), in order to sufficiently apprise the defendant of the charge he must be prepared to meet and to prevent him from being charged with the same crime in the future. If, therefore, an amendment goes to an essential element of the crime, it is a substantial change and cannot be made except by resubmission to the grand jury, *Russell v. United States*, 1962, 369 U.S. 749, 770 82 S.Ct. 1038, 8 L.Ed.2d 240.

When the original indictment was returned in this case, the substantive counts did not allege that the appellants had "willfully" violated the statute. Willfullness is specifically set out in the statute *sub judice*. It is thus an essential element of the offense and such statutory requirement cannot be ignored. *United States v. Salliey*, 4 Cir. 1966, 360 F.2d 699, 701. *Cf. Standard Oil Co. of Texas v. United States*, 5 Cir. 1962, 307 F.2d 120; *Pullen v. United States*, 5 Cir. 1947, 164 F.2d 756 (en banc). It must be alleged and proven in order to obtain a conviction. *United States v. Inciso* 7 Cir. 1961, 292 F.2d 374, 380, *cert. denied*, 1961, 368 U.S. 920, 82 S.Ct. 241, 7 L.Ed.2d 135; *United States v. Motzell*, D.N.J 1961, 199 F. Supp. 192. It is clear that the amendment here was impermissible.[3]

The Government contends that even though willfulness was a necessary element and not alleged in the original indictment, it was implied. It argues that the original indictment was sufficient in this respect and that the amendment did not substantially alter the indictment. We disagree. This essential element cannot be implied from a reasonable reading of the language of the indictment. *See United States v. Beard*, 3 Cir. 1969, 414 F.2d 1014; *Walker v. United States*, 5 Cir. 1965, 342 F.2d 22, *cert. denied*, 1965, 382 U.S. 859, 86 S.Ct. 117 15 L.Ed.2d 97. *See also U.S. v. Coleman*, 5 Cir. 1971, ____ F.2d ____. [No. 71-1921, Sept. 30, 1971].

---

[3] *But see United States v. Ryan*, 1956, 350 U.S. 299, 305, 76 S.Ct. 400, 100 L.Ed. 335; *International Longshoremen's Ass'n. v. Seatrain Lines, Inc.*, 2 Cir. 1964, 326 F.2d 916, 919; and *United States v. Ryan*, 2 Cir. 1956, 232 F.2d 481, 483 (on remand) which implies that *mens rea* is not a necessary element of 29 U.S.C.A. §186.

The Government further asserts that because the substantive counts charged misdemeanors, it could have originally proceeded by information against the appellants. With leave of court an amendment to an information is permissible. Thus, it argues, that the amendments to the indictment were also proper. While it is true that the crimes alleged in counts 2, 3 and 4 are misdemeanors, the Government chose to present the case to the grand jury and secure an indictment. Having so elected, it is bound by the principles governing indictments. *United States v. Lippi*, D.Del. 1961, 193 F. Supp. 441, 443.[4] We therefore reverse the convictions of both appellants on counts 3 and 4.

Sufficiency of the Conspiracy Count

Appellants attacked the sufficiency of the conspiracy count for the first time on oral argument. First, They contended that the conspiracy count was insufficient because it made reference only to the number of the statute they were alleged to have conspired to violate. They argue that 29 U.S.C.A. §186 contains several prohibitions, and therefore, they should have been apprised of exactly which provision of the statute they were charged with having conspired to violate. Since this point was not preserved at trial, and is not a jurisdictional defect, *see, e.g., Walker v. United States*, *supra* at 26, the asserted error is not properly before this Court. *United States v. Trollinger*, 5 Cir. 1969, 415 F.2d

[4] Although the issue was not raised the Supreme Court in *Russell v. United States*, *supra*, found that the indictment, which charged a misdemeanor, was infirm because it was amended in a matter of substance.

527; 528; *United States v. Ellington*, 5 Cir. 1969, 406 F.2d 348; Fed. R. Crim. P. 12(b)(2); WRIGHT, FEDERAL PRACTICE AND PROCEDURE §193 (1969).

Secondly, appellants contended that the conspiracy count alleged the object of the conspiracy in the same language which was used in the substantive counts, and, since the latter are defective because of the omitted essential element of willfulness, the conspiracy count is likewise defective. While we must consider this claimed error even though no objection was made in the court below, *Walker v. United States, supra*, we find it without merit.

The essential elements of a conspiracy are an agreement by two or more persons to combine efforts for an illegal purpose and an overt act by one of the members in furtherance of the agreement. *Roberts v. United States*, 5 Cir. 1969, 416 F.2d 1216, 1220. In a conspiracy count the conspiracy is the gist of the offense and it is not necessary that the object of the conspiracy be described in the detail necessary in an indictment for the substantive offense itself. *See Wong Tai v. United States*, 1927, 273 U.S. 77, 47 S.Ct. 300, 71 L.Ed. 545; *Walker v. United States, supra* at 25; *Lott v. United States*, 5 Cir. 1962, 309 F.2d 115, 120, *cert. denied*, 1963, 371 U.S. 950, 83 S.Ct. 504, 9 L.Ed.2d 498; *Beitel v. United States*, 5 Cir. 1962, 306 F.2d 665, 670; *Schnautz v. United States*, 5 Cir. 1959, 263 F.2d 525, 530, *cert. denied*, 1959, 360 U.S. 910, 79 S.Ct. 1294, 3 L.Ed.2d 1260. Every element of the substantive offense need not be alleged within the conspiracy count. *United States v. Knox Coal Co.*, 3 Cir. 1965,

347 F.2d 33, 38, *cert. denied*, 1965, 382 U.S. 904.[5] The conspiracy count here sufficiently alleges the essential elements and is, therefore, not infirm.

Bellows' Fifth Amendment Testimony

Both appellants insist that it was error to permit witness Bellows to testify that in October, 1969, Fischetti told him to take the Fifth Amendment if Bellows was called as a witness before the grand jury. Fischetti argues that the statement was prejudicial to him and Gillette argues that it was inadmissible hearsay.

We agree that this testimony is perjudicial to Fischetti. This does not, however, make it inadmissible with respect to him, for it is clear that in this instance evidence of other criminal acts of Fischetti, whether he is prosecuted for them or not, is admissible if it shows that the acts were committed with the intent of avoiding punishment for the present crime. See McCORMACK, EVIDENCE §157 (1954); WRIGHT, *supra* § 410.

With respect to Gillette, the trial court admitted Bellows' testimony on the ground that it wasn't clear when the conspiracy ended and on the further ground that it was an attempt to conceal the conspiracy.

An out of court statement by a co-conspirator is admissible

---

[5] *But see Nelson v. United States*, 10 Cir. 1969, 406 F.2d 1136. Although *Nelson* cites *Wilkins v. United States*, 5 Cir. 1967, 376 F.2d 552, 562, *cert. denied*, 1967, 389 U.S. 964, we consider *Wilkins* inapposite on the facts.

against the other conspirators if it is made in furtherance of the conspiracy. *Dutton v. Evans*, 1970, 400 U.S. 74, 81, 91 S.Ct. 210, 27 L.Ed.2d 213. The statement, however, becomes inadmissible if it was made after the conspiracy has ended for then it can no longer be said to have been made in furtherance of the conspiracy. *Krulewitch v. United States*, 1948, 336 U.S. 440, 442, 69 S.Ct. 716, 93 L.Ed. 790. Here the conspiracy was complete. The last payment made to Fischetti was in August, 1969, and this was the last act of any significance in connection with the conspiracy notwithstanding the fact that the indictment alleged that the conspiracy continued up until December, 1969. Furthermore, we agree with Gillette that the Court's instruction concerning Bellows' testimony was insufficient to cure the error.[6] *See Delli Paoli v. United States*, 1957, 352 U.S. 232, 237, 77 S.Ct. 294, 1 L.Ed.2d 278. It was also error to admit the statement on the basis that it was made to conceal the conspiracy. *See Krulewitch v. United States*, *supra* at 443.

Even though error was committed it was harmless. Since the error was not of constitutional dimension, *Dutton v. Evans*, *supra* at 82, the standard to be applied tests the effect of the testimony on the jury.

> If, when all is said and done, the conviction [court] is sure that the error did not influence the

[6] When Fischetti's attorney objected to the admission of some documentary evidence (an incident unrelated to the statement in question here) and again in the general charge, the court instructed the jury that statements of a co-conspirator are not admissible against the other conspirator if they are made after the termination of the conspiracy.

> jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or specific command of Congress [citations omitted]. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.

Kotteakos v. United States, 1946, 328 U.S. 750, 746-765, 66 S.Ct. 1239, 90 L.Ed. 1557; *See also United States v. Cohen*, 5 Cir. 1969, 418 F.2d 68, 70. A careful consideration of the entire record in this case convinces us "that the judgment of the jury was not swayed or influenced by the admission of this testimony" and that the error is harmless. *See Lutwak v. United States*, 1953, 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593.

The Conspiracy Charge

Fischetti urges that the instructions to the jury on conspiracy were erroneous because they were ambiguous. The portion of the charge questioned states:

> What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the defendants and or other persons, in some way or manner, or through some contrivance, expressly or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

Fischetti argues that because of the "aind or" the jury could have found the defendants guilty even though other persons, not the defendants, came to a mutual understanding. We disagree. The jury was instructed that they must find that a conspiracy was in fact formed. The appellants did not have to originally form the conspiracy in order to later join the conspiracy and be convicted for their complicity in it.

Fischetti also complains that in several portions of the charge the judge referred to "either" of the defendants, and that this allowed the jury to convict even if neither participated in the conspiracy. This is a strained construction to say the least. By the use of the term "either", the court simply told the jury that they could find either one of the defendants or both of them guilty of the charges. The instruction is clear and correct.

The appellant Gillette contends that the evidence was not sufficient to convict him on counts 3 and 4 because the Government failed to prove that he had any duties as a labor official in the Miami Building and Trades Council. Because, as we have indicated, the conviction on these two counts must be reversed, we pretermit discussion of this issue.

The judgment of the district court is AFFIRMED as to counts 1 and REVERSED as to counts 3 and 4.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 70-221-CR-WM

18 U.S.C. 371
29 U.S.C. 186

UNITED STATES OF AMERICA

v.

JOSEPH JOHN FISCHETTI
and DONALD F. GILLETTE

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

1. That from on or about May 27, 1968, to and including December 16, 1969, in the Southern District of Florida, JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE, the defendants herein, and Maurice G. Bellows, named herein as a co-conspirator but not as a defendant, together with other persons to the Grand Jury unknown, did knowingly and willfully combine, conspire, confederate, and agree together and with each other to commit offenses against the United States, that is, to violate Section 186 of Title 29, United States Code

2. That at all times mentioned herein, the said Maurice G. Bellows was the agent and representative of a Florida corporation, Bellows Development Corp., employer of employees engaged in an industry affecting commerce, to wit, the building construction business.

3. That at all times mentioned herein, defendant DONALD F. GILLETTE was an officer and employee of a labor organization engaged in an industry affecting commerce, that is, he was Recording Secretary and Secretary-Treasurer, respectively, and an Organizer and Business Agent of Teamsters Local Union No. 769, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and as such officer and employee was at all times mentioned herein a delegate to the Miami Building and Construction Trades Council and a member of the Board of Business Agents of said Miami Building and Construction Trades Council.

4. It was part of said conspiracy that the defendants JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE would request, demand, and agree to receive and accept money from Maurice G. Bellows, agent and representative of said Bellows Development Corp., and that Maurice G. Bellows, would agree to pay and deliver money to defendants JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE, with intent to influence defendant DONALD F. GILLETTE, in respect to his actions, decisions and duties as such officer and employee of said Teamsters Local Union No. 769, including his actions, decisions and duties as a delegate to the Miami Building and

Construction Trades Council and as a member of the Board of Business Agents of said Miami Building and Construction Trades Council.

5. It was further a part of said conspiracy that Maurice G. Bellows, agent and representative of said Bellows Development Corp., would pay and deliver to the defendants JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE who would receive and accept from said Maurice G. Bellows the payment and delivery of money in the amount of twelve-thousand dollars ($12,000) with intent to influence defendant DONALD F. GILLETTE in respect to his actions, decisions and duties as such officer and employee of said Teamsters Local Union No. 769, including his actions, decisions and duties as a delegate to the Miami Building and Construction Trades Council and as a member of the Board of Business Agents of said Miami Building and Construction Trades Council.

6. It was further a part of said conspiracy that the defendants JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE would demand of Maurice G. Bellows, agent and representative of said Bellows Development Corp., and Maurice G. Bellows would agree to deliver, and would deliver, things of value to defendant JOSEPH JOHN FISCHETTI, to wit: checks for the amount of one-hundred-fifty dollars ($150) per week, less tax deductions, during the period from February 20, 1969 to August 21, 1969; all with intent to influence defendant DONALD E. GILLETTE in respect to his actions, decisions and duties as such officer and employee of said Teamsters Local Union No. 769, including

his actions, decisions and duties as a delegate to the Miami Building and Construction Trades Council and as a member of the Board of Business Agents of said Miami Building and Construction Trades Council.

In furtherance of the conspiracy and to effect the objects and purposes thereof, the defendants and their co-conspirators did commit in the Southern District of Florida, among other acts, the following:

OVERT ACTS

1. On or about January 27, 1969, defendants JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE met with Maurice G. Bellows at Keystone Point, North Miami, Florida.

2. On or about February 7, 1969, defendant DONALD F. GILLETTE had a telephone conversation with Sherman S. Winn.

3. On or about February 12, 1969, defendants JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE met with Maurice G. Bellows at Keystone Point, North Miami, Florida.

4. On or about February 14, 1969, defendant JOSEPH JOHN FISCHETTI delivered to Maurice G. Bellows the original Articles of Agreement entered into by and between Bellows Development Corp., and the Miami Building and Construction Trades Council on May 27, 1968.

5. On or about February 14, 1969, defendant JOSEPH JOHN FISCHETTI received delivery of money in the sum of twelve-thousand dollars ($12,000) from Maurice G. Bellows.

All in violation of Section 371 of Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT III

On or about February 12, 1969, in the Southern District of Florida, defendants JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE demanded, requested and agreed to receive and accept the payment and delivery of money in the amount of twelve-thousand dollars ($12,000) plus one-hundred-fifty dollars ($150) per week from Maurice G. Bellows, agent and representative of a Florida corporation, Bellows Development Corp., an employer engaged in an industry affecting commerce, with intent to influence defendant DONALD F. GILLETTE, an officer and employee of a labor organization engaged in an industry affecting commerce, to wit, Teamsters Local Union No. 769, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in respect to the actions, decisions and duties of defendant DONALD F. GILLETTE as Recording Secretary, Organizer and Business Agent of said Teamsters Local Union No. 769, including his actions, decisions and duties as a delegate to the Miami Building and Construction Trades Council and as a member of the

Appendix B.

Board of Business Agents of said Miami Building and Construction Trades Council.

All in violation of Section 186(b)(1), Title 29, United States Code, and Section 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT IV

On or about February 14, 1969, in the Southern District of Florida, defendant JOSEPH JOHN FISCHETTI and DONALD F. GILLETTE received and accepted the payment and delivery of money in the amount of twelve-thousand dollars ($12,000) from Maurice G. Bellows, agent and representative of a Florida corporation, Bellows Development Corp., an employer engaged in an industry affecting commerce, with intent to influence defendant DONALD F. GILLETTE, an officer and employee of a labor organization engaged in an industry affecting commerce, to wit, Teamsters Local Union No. 769, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in respect to the actions, decisions and duties of defendant DONALD F. GILLETTE as Recording Secretary, Organizer and Business Agent of said Teamsters Local Union No. 769, including his actions, decisions and duties as a delegate to the Miami Building Construction Trades Council and as a member of the Board of Business Agents of said Miami Building and Construction Trades Council.

Appendix B

All in violation of Section 186(b)(1), Title 29 United States Code and Section 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT V

On or about October 24, 1969, in the Southern District of Florida, defendant JOSEPH JOHN FISCHETTI, corruptly endeavored to influence, obstruct and impede the due administration of justice by corruptly endeavoring to influence, intimidate and impede Maurice G. Bellows, a Federal Grand Jury witness, in connection with testimony the said Maurice G. Bellows would give before the Federal Grand Jury in the Southern District of Florida.

All in violation of Section 1503, Title 18, United States Code.

A TRUE BILL

Foreman

ROBERT RUST,
UNITED STATES ATTORNEY

By: _____
DOUGALD D. MCMILLAN
Attorney, United States
Department of Justice